Supreme Court, U.S.
FILED

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No. _____

In The

Supreme Court of the United States

October Term, 1996

SUAN SEE CHONG AND CHIU HI TAN,

Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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45 pp

QUESTION PRESENTED

The Attorney General, in her discretion, is authorized to grant suspension of deportation to an alien if the Attorney General determines that the alien is deportable under any law of the United States, except as provided in 8 U.S.C. § 1254(a)(2), has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of his application, is a person of good moral character, and is a person whose deportation would result in extreme hardship to the alien or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence. 8 U.S.C. § 1254(a)(1). The authority of the Attorney General to construe the "extreme hardship" requirement has been narrowly upheld. *INS v. Wang*, 450 U.S. 139 (1981).

The question presented is:

(1) Whether the ruling of the United States Court of Appeals for the Eleventh Circuit in the present case denying the Petitioner's application for suspension of deportation was an abuse of discretion?

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TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES,

MAY IT PLEASE THE COURT,

Petitioners, Suan See Chong and Chiu Hi Tan, respectfully pray that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in this matter on December 31, 1996.

OPINIONS AND JUDGMENTS BELOW

The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Eleventh Circuit, entered December 31, 1996, are reprinted in the Appendix to the Writ at pages App. 1 through App. 2. The Decision and Order of the Board of Immigration Appeals, dated March 30, 1995, are reprinted in the Appendix to this Writ at pages App. 3 through App. 8. The Opinion and Judgment of the three-judge panel of the United States Court of Appeals for the Eleventh Circuit, entered October 6, 1994 are reprinted in the Appendix to this Writ at pages App. 9 through App. 12. The Decision and Order of the Board of Immigration Appeals, dated November 16, 1993, are reprinted in the Appendix to this Writ at pages App. 13 through App. 19. The Order and Oral Decision of the Immigration Judge, dated December 8, 1992, are reprinted in the Appendix to this Writ at pages App. 20 through App. 28.

STATEMENT OF JURISDICTION

The judgment of the oral argument at the United States Court of Appeals for the Eleventh Circuit was entered on December 31, 1996, affirming the Board of Immigration Appeals' decision dated March 30, 1995. The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(a) and Sup. Ct. R. 20.1.

STATUTES AND REGULATIONS INVOLVED

This case involves the following provisions of the United States Code:

Title 8 U.S.C. § 1254(a)(1)[1]

> As hereinafter prescribed in this section, the Attorney General may, in his discretion, suspend deportation and adjust the status to that of an alien lawfully admitted for permanent residence, in the case of an alien (other than an alien described in section 241(a)(4)(D)) who applies to the Attorney General for suspension of deportation and –
>
> (1) is deportable under any law of the United States except the provisions specified in paragraph (2) of this subsection; has been physically present in the United States for a continuous period of not less than seven years immediately preceding the date of such application, and proves that during all of such period he was and is a person of good moral character; and is a

[1] Referred to throughout this Writ as Section 244(a)(1) of the Immigration and Nationality Act.

person whose deportation would, in the opinion of the Attorney General, result in extreme hardship to the alien, or to his spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

STATEMENT OF THE CASE

I. Basis for Federal Jurisdiction in the Court of First Instance

Suan See Chong and Chiu Hi Tan (hereinafter "Mr. and Mrs. Tan" or the "Petitioners") herein seek the review of the decision by the United States Court of Appeals for the Eleventh Circuit on their petition for Review taken from the administrative decision by the Board of Immigration Appeals (hereinafter "BIA") in deportation proceedings. The Eleventh Circuit's jurisdiction was invoked under 8 U.S.C. § 1105a(a), which establishes the exclusive procedure for judicial review of such administrative decisions.

II. Statement of the Facts

Petitioners, Suan See Chong and Chiu Hi Tan, are a thirty-three and thirty-one year old married couple, both of whom are natives and citizens of Malaysia. Mr. and Mrs. Tan have two United States citizen children, ages five and nine.

Mr. Tan came to the United States as a student and eventually received a Bachelor of Architecture degree from the University of Southwestern Louisiana. Mr. Tan

has worked at various jobs while in the United States in order to support himself and his family including employment as a driver for Domino's Pizza, internships as an architect, and presently he manages his own business, Tech Advanced, Inc.

Tech Advanced, Inc. is a computer consulting company in Pensacola, Florida which Mr. Tan started in 1991. Presently the company employs over 40 U.S. citizens and grosses over $1 million per year. The company pays all its required state and federal taxes. Mr. and Mrs. Tan have invested over $1 million in this business. Mr. Tan's position is that he would not be able to recoup this investment if he were forced to sell the company because he would be deported.

Mr. Tan has also testified extensively regarding the religious discrimination which reigns in Malaysia. The country is governed and controlled by Moslems. In Malaysia, a person's privileges depend on his religious affiliation. Mr. and Mrs. Tan are not Moslems. As such, they and their children would be subject to constant discrimination in regards to employment and educational opportunities. Mr. Tan has testified that he would not be able to open his own business in Malaysia without giving the Moslem party a 51% ownership interest in any company he owns. Further, due to the fact he is not a Moslem, Mr. Tan's job opportunities would be limited to truck driving. He would not be allowed to make use of his architectural degree or his prior computer experience because those jobs are restricted to those who practice the Islamic faith.

Additionally, Mr. Tan has testified that the educational opportunities available to his U.S. citizen children

would be severely restricted due to the religious discrimination in Malaysia. The schools they could attend as primary and high school students are designated based on religion. Also, non-Moslems are not allowed to attend college in Malaysia.

Mr. and Mrs. Tan's oldest child is presently in the sixth grade. Mr. and Mrs. Tan are very active in the Parent Teacher Association at her school. They are also active in the Gulf Coast Chinese Association in which they teach culture and language to local youth. They also attend weekly meetings of the Gulf Coast Chinese Association.

III. Course of proceedings and disposition in the Court below.

An Order to Show Cause ("OSC") dated March 24, 1992 was issued by the Immigration and Naturalization Service ("INS") to each of the Appellants. Suan See Chong's ("Mrs. Tan") OSC charged that she was deportable pursuant to § 241(a)(1)(C)(i) of the Immigration and Nationality Act for having entered as a nonimmigrant student authorized to remain in the United States for the duration of that status, and thereafter having changed her status to that of the wife of a nonimmigrant student, and for having failed to comply with the terms and conditions of her F-2 nonimmigrant status.

Chiu Hi Tan's ("Mr. Tan") OSC charged that he was deportable pursuant to § 241(a)(1)(B) of the Immigration and Nationality Act for having entered the United States as a nonimmigrant student authorized to remain in the United States for the duration of that status, and for

having failed to comply with the terms and conditions of his F-1 nonimmigrant status.

At the master calendar hearing on August 20, 1992, Mr. and Mrs. Tan submitted a written stipulation to the Court which admitted the allegations in the Orders to Show Cause, conceded deportability and designated Malaysia as the country of depc rtation. At that hearing, Mr. and Mrs. Tan asked for relief from deportation in the nature of suspension of deportation and voluntary departure. The proceedings were then delayed to allow the Petitioners to file the appropriate applications with the Immigration Court.

On December 8, 1992, a hearing on the merits of Mr. and Mrs. Tan's application was held before the Immigration Judge. At this hearing, the Petitioners testified in support of their applications. Also, at the hearing, the OSC's, the Petitioner's Stipulations, and the Petitioner's applications and supporting documents were admitted as Exhibits 1, 1A, 2, 2A, 3, and 3A respectively to the record. At the conclusion of the hearing, the Immigration Judge denied Mr. and Mrs. Tan's application for suspension of deportation. Mr. and Mrs. Tan, who reserved their right to appeal, were granted voluntary departure.

On December 18, 1992, the Petitioners filed their Notice of Appeal and Brief in Support of Notice of Appeal with the Office of the Immigration Judge. Pursuant to the deadline set by the Office of the Immigration Judge, the Petitioner's supplemental brief in Support of Appeal was submitted to the Board of Immigration Appeals ("BIA") on March 27, 1993.

On November 16, 1993, the BIA rendered its decision dismissing the Petitioner's appeal. The Petition for Review was filed with this Court on December 27, 1993. The Petitioner's Brief was submitted to the Eleventh Circuit on March 31, 1994. The Government submitted its Brief on April 29, 1994. On October 6, 1994, the Order and Opinion of the Eleventh Circuit was entered denying the Petitioner's appeal.

Petitioners filed a "Motion to Reopen" on September 28, 1994 to the BIA based on newly discovered evidence in the case. They also filed a Writ of Certiorari to the United States Supreme Court on October 24, 1994 in an effort to review the BIA's previous denial of November 16, 1993.

The U.S. Supreme Court denied Petitioners' Writ of Certiorari on December 12, 1994. The BIA denied the "Motion to Reopen" on March 30, 1995. A Petition for Review of the BIA's March 1995 denial was filed with the Eleventh Circuit and the Brief was submitted on August 21, 1995. The INS' brief was submitted in January 1996.

On March 15, 1996, Petitioners filed a Motion to Stay Proceedings with the Eleventh Circuit. The motion was granted on April 30, 1996 and the matter was set for oral argument before the Eleventh Circuit. Oral Argument was conducted on December 13, 1996 and the BIA's denial of Petitioners' appeal was affirmed by the Eleventh Circuit on December 31, 1996. Pursuant to Federal Rule of the Appellate Procedure 41, the Eleventh Circuit's mandate is schedule to issue twenty-one days from the date that the appeal was denied.

ARGUMENT FOR ALLOWANCE OF THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE BOARD OF IMMIGRATION APPEALS AND THE IMMIGRATION JUDGE WERE CORRECT IN FINDING THAT THE PETITIONERS FAILED TO DEMONSTRATE THAT THEY AND THEIR UNITED STATES CITIZEN CHILDREN WOULD SUFFER EXTREME HARDSHIP IF THEY WERE DEPORTED TO MALAYSIA. THE ELEVENTH CIRCUIT, IMMIGRATION JUDGE, AND THE BOARD OF IMMIGRATION APPEALS FAILED TO GIVE ANY WEIGHT OR TO DISCUSS THE EXTENT OF RELIGIOUS DISCRIMINATION IN MALAYSIA AND THE EFFECT IT WOULD HAVE ON THE PETITIONERS AND THEIR UNITED STATES CITIZEN CHILDREN.

Because the Immigration Judge found physical presence and good moral character and the INS did not appeal these issues, the only issue before the Court is whether Mr. and Mrs. Tan and their United States citizen children would suffer extreme hardship if they were deported to Malaysia. The Immigration Judge found that Mr. and Mrs. Tan failed to demonstrate, as required under the law, "extreme hardship" to either themselves or their United States citizen children, and thus they were statutorily ineligible for suspension of deportation pursuant to § 244(a)(1) of the Immigration and Nationality Act.

In *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), the BIA said that factors to consider in determining whether deportation will result in extreme hardship are the condition of health of the alien, the economic and political conditions of the country to which the alien is returnable,

the financial status of the alien including his business and occupation, the possibility of other means of adjustment of status, whether that alien offers special assistance to the community, the alien's immigration history and position in the community. Further, it has been held that the term "extreme hardship" is rather nebulous and the presence of "extreme hardship" may depend upon the facts and circumstances of an individual case. *Matter of Kim*, 15 I&N Dec. 1988 (BIA 1974).

In the case at bar, the factors pertaining to Mr. and Mrs. Tan's hardship meets the criteria set forth in *Matter of Anderson*. Mr. Tan testified extensively regarding the economic hardship which would result to his family if he were deported and the educational opportunities that would be lacking for his United States citizen children should he be deported. Although it was held in *Matter of Kim, supra*, that extreme hardship is not shown if the only factors presented tended to show better economic and educational opportunities for the respondent's United States citizen children, economic and educational disadvantage were only two of the *Matter of Anderson* factors which Mr. Tan established via his testimony. Mr. Tan also testified that he has strong ties to the Pensacola community by virtue of his business which he started in 1991. He and his wife are also actively involved in his daughter's school activities and in the Gulf Coast Chinese Association. The alien's position and history in the community are also factors to be considered under *Matter of Anderson* and are facts which were positively demonstrated in the case at bar.

Furthermore, the BIA recently articulated that factors such as economic detriment due to loss of a job or business, elements typically experienced in relocating or adjusting to life in one's native country, are all to be considered in the assessment of aggregate hardship. *In Re O-J-O*, Int. Dec. 3280 (BIA 1996). While it appears that *O-J-O, supra,* has been repudiated by Public Law 104-208 (Sept. 30, 1996), this repudiation is prospective only. And, without question, Mr. and Mrs. Tan and their two United States citizen children will suffer economically if forced to relocate to Malaysia.

In addition, the most compelling aspect of the extreme hardship which Mr. Tan established and which was seemingly ignored by all of the Courts below was the fact that, if deported to Malaysia, Mr. and Mrs. Tan and their two United States citizen children would be subject to economic and educational disadvantages based solely on their religious beliefs and practices. It is well-established that Malaysia practices severe religious discrimination against those citizens who are non-Moslems, such as the Tans. Because the country is governed by Moslems, many privileges of education and employment are restricted for those who are not Moslem. Mr. and Mrs. Tan and their children would be subject to this discrimination and would be unable to avail themselves of many of the job opportunities, and their children of many of the educational opportunities which otherwise are available in that country. Further, Mr. Tan's educational background and business experience would be of no value to him. Because of his non-Moslem status he would not be able to work in either of those fields. Each of the Courts below totally disregarded this testimony and found that

the Petitioners merely showed economic and educational disadvantages in their native country which was insufficient to establish extreme hardship. The Appellants contend that it is not merely the inability to find similar employment but the burden of constant religious discrimination which should have been considered by the Courts below when evaluating their claim of extreme hardship. Among the factors listed in *Matter of Anderson*, are the conditions in the country to which the Petitioners would return, both economic and political. The lower Courts failed to consider the conditions of religious discrimination in Malaysia and, in doing so, abused their discretion in denying the Petitioners' application.

A determination of whether extreme hardship will result from an alien's deportation depends on the specific circumstances of the case. The typical results of deportation are insufficient to establish "extreme hardship", which will not be found absent a showing of significant actual or potential injury. *Hassan v. I.N.S.*, 927 F.2d 465 (9th Cir. 1991). It is generally accepted that extreme hardship is established when the alien demonstrates that the hardship which he would experience is beyond the usual hardship experienced by most aliens required to leave the United States and return to their native land. *Matter of Chumpitazi*, 16 I&N Dec. 629 (BIA 1978). The Petitioners contend that they established just such a case and that the lower Courts failed to recognize it and to consider the exceptional situation which they would be in if they were deported to Malaysia. Unlike most aliens native to Malaysia, Mr. and Mrs. Tan do not practice the Moslem faith. Thus, as proven by Tan's extensive testimony at the hearing on the Merits, the hardship which would result from

their deportation is far more extreme than that which most native Malaysians deported to their native country would experience. Mr. Tan's testimony established the actual injury which he and his family will suffer should they be deported to Malaysia. It is this factor, considered cumulatively with the other factors discussed above, which qualifies Mr. and Mrs. Tan for the granting of the exceptional remedy of suspension of deportation.

The authority of the Attorney General to narrowly construe "extreme hardship" has been upheld in *I.N.S. v. Wang*, 450 U.S. 139 (1981). However, the facts of Mr. and Mrs. Tan's case so clearly fall within the criteria of extreme hardship that it is suggested that, as a matter of law, Mr. and Mrs. Tan should be granted suspension of deportation.

CONCLUSION

For the reasons set forth herein, a Writ of Certiorari should issue to review the opinion and judgment of the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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New Orleans, LA 70113
(504) 522-2800

Attorney of Record for Petitioners Suan See Chong and Chiu Hi Tan

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 95-2443

D.C. Docket No. A29 597 221/222

SUAN SEE CHONG; CHIU HI TAN,

Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICES,

Respondent.

Petition for Review of an Order
of the Immigration and Naturalization Service

(Filed December 31, 1996)

Before KRAVITCH and ANDERSON Circuit Judges, and FAY, Senior Circuit Judges.

PER CURIAM: AFFIRMED. *See* 11th Cir. R. 36-1.[1]

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[1] 11th Cir. R. 36-1 provides:

When the court determines that any of the following circumstances exist:

(a) the judgment of the district court is based on findings of fact that are not clearly erroneous;

(b) the evidence in support of a jury verdict is sufficient;

(c) the order of an administrative agency is supported by substantial evidence on the record as a whole;

(d) a summary judgment, directed verdict, or judgment on the pleadings is supported by the record;

(e) the judgment has been entered without a reversible error of law;

and an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

(SEAL)

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals

Chairman

Lawrence B. Fabacher II, Esquire
Gill and Fabacher
833 Baronne St.
New Orleans, LA 70113

5107 Leesburg Pike, Suite 2400
Falls Church, Virginia 22041

MAR 30 1995

CHONG
A29 597 221/222

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Very Truly Yours,

/s/ Paul W. Schmidt
Paul W. Schmidt
Chairman

Enclosure

Panel Members: Paul W. Schmidt
FRED W. VACCA
JOAN V. CHURCHILL

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Files: A29 597 221 - Orlando Date: MAR 30 1995
A29 597 222

In re: SUAN SEE CHONG
CHIU HI TAN

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF
RESPONDENTS: Lawrence B. Fabacher, II, Esquire
Gill and Fabacher
833 Baronne Street
New Orleans, Louisiana 70113

ON BEHALF OF SERVICE: Rico M. Sogocio
General Attorney

CHARGE:

Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] – Nonimmigrant – failed to comply with conditions of status (A29 597 221)

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – In the United States in violation of law (A29 597 222)

APPLICATION: Reopening

The respondents' case was last before us on November 16, 1993, when we dismissed their appeal from an immigration judge's decision denying the applications for

suspension of deportation under section 244(a)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1254(a)(1), and granting them the privilege of voluntary departure. On September 28, 1994, the respondents filed a motion to reopen these proceedings. The Immigration and Naturalization Service opposes the respondents' motion. The motion will be denied.

Motions to reopen in deportation proceedings will not be granted unless the respondent can show that the evidence sought to be offered is material and was not available at the respondent's former hearing. 8 C.F.R. § 3.2. A motion to reopen shall state the new facts to be proved and shall be supported by affidavits or other evidentiary material. 8 C.F.R. § 3.8. An alien must establish prima facie eligibility for the relief sought before a motion to reopen will be granted. *See INS v. Doherty*, 502 U.S. 314 (1992); *INS v. Abudu*, 485 U.S. 94 (1988); *INS v. Jong Ha Wang*, 450 U.S. 139 (1981) (per curiam); *Matter of Ruiz*, Interim Decision 3116 (BIA 1989). A motion to reopen may be denied on a discretionary basis even if the alien has made out a prima facie case for relief. *INS v. Doherty, supra; INS v. Abudu, supra.* In such cases as this one where a respondent has already been provided the opportunity to apply for the relief requested, the Board ordinarily will not consider a discretionary grant of the motion unless the alien meets a "heavy burden" and presents sufficient new evidence to satisfy us that, if the proceedings were reopened, the new evidence would likely change the result in the case. *Matter of Coelho*, Interim Decision 3172 (BIA 1992); *see also INS v. Doherty, supra; INS v. Abudu, supra.*

In our previous decision in the respondents' case, we determined that the respondents had not met the statutory criterion of extreme hardship so as to warrant suspension of deportation. We specifically noted, inter alia, that the respondents owned a business which then employed two United States citizens and had gross annual revenues in excess of $500,000. We also considered the potential hardship to the respondents' two United States citizen children, who were ages 2 and 6 at the time of that decision.

In a motion to reopen the deportation proceedings, the respondents state that the proceedings should be reopened as a result of the discovery of new and material evidence which was previously unavailable. Specifically, it is reported that the respondents' business now employs five workers and commercial property in the amount of $95,384.00 was recently purchased for the business. The respondents also report that they have purchased a house valued at $220,000.00. Further, the respondents report that their children, now ages 4 and 7, have grown more accustomed to their school and friends in the United States.

We do not find that the new evidence which the respondents have submitted establishes a prima facie case of eligibility for suspension of deportation. The respondents have subsequently expanded their business, and to that end they acquired commercial property on July 12, 1994. We also observe that the residential property purchase by the respondents was made on March 30, 1994. Thus, both of the real estate transactions occurred well after our previous dismissal on November 16, 1993, of the respondents' appeal of the immigration judge's

denial of their suspension applications. Equities which are acquired after a final order of deportation has been issued against an alien are entitled to less weight than those acquired before an alien has been found deportable. *Matter of Correa,* 19 I&N Dec. 130 (BIA 1984); *see Garcia-Lopez v. INS,* 923 F.2d 72 (7th Cir. 1991).

We note also that as to the two United States citizen children; who are now ages 4 and 7, the respondents have not explicitly stated if the children will return to Malaysia with them. Any hardship the children might face if left in the United States is the result of parental choice, not of the parents' deportation. *See Matter of Ige,* Interim Decision 3230 (BIA 1994). The fact that an alien has a United States citizen child does not of itself justify suspension of deportation. An alien illegally in the United States does not gain a favored status by the birth of a child in this country. Even though a child may face difficulties adjusting to life in his parents' homeland, these problems do not materially differ from those encountered by other children who relocate with their parents, especially at a young age. The fact that economic and educational opportunities for the child are better in the United States than in the alien's homeland does not establish extreme hardship. *Id.* The respondents' two children are still relatively young and it is not established that the move to Malaysia would be significantly disruptive of their educational programs. *Matter of Kim,* 15 I&N Dec. 88 (BIA 1974);

In view of the above, we again find that the respondents have not met the statutory criterion of extreme hardship. *See Matter of Ige; supra; Matter of Anderson,* 16 I&N Dec. 596 (BIA 1976). The hardship described by the

respondents, considering the relevant factors in the aggregate, is not the kind of hardship contemplated by Congress.

Because the respondents have not satisfied the legal prerequisites to reopen the proceedings, the motion to reopen will be denied. *See INS v. Doherty, supra; INS v. Abudu, supra; Matter of Coelho, supra.*

ORDER: The motion to reopen is denied.

/s/ Phil W. Schmidt
FOR THE BOARD

DO NOT PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 93-3537
Non-Argument Calendar

INS. Nos. A29 597 221
A29 597 222

SUAN SEE CHONG;
CHIU HI TAN,

Petitioners,

versus

IMMIGRATION AND NATURALIZATION SERVICES,

Respondent.

Petition for Review of an Order
of the Board of Immigration Appeals

(Filed October 6, 1994)

Before TJOFLAT, Chief Judge, HATCHETT and DUBINA, Circuit Judges.

PER CURIAM:

FACTS

The petitioners, Suan See Chong and Chi Hi Tan, are married citizens of Malaysia. They have two children

who live in the United States. Chong also has a brother who lives in the United States.

Chong came to this county in 1982 as a visitor and obtained authorization to remain as a student at Southwest Louisiana University. In 1989, he received an architecture degree and was permitted to remain in the United States as a trainee until April 1, 1993.

In 1991, Chong left the employ of his architectural firm and started his own computer consulting firm. His computer firm employs two United States citizens and grosses more than $500,000 a year. Chong has invested over $30,000 in the company.

On March 24, 1992, the Immigration and Naturalization Service (INS) delivered to the petitioners an Order to Show Cause why they should not be deported for remaining in the United States longer than permitted under section 241(a)(1)(B) of the Immigration and Nationality Act (the Act). *See* 8 U.S.C. § 1251(a)(1)(B). At a hearing, the petitioners admitted the allegations in the Order to Show Cause and conceded their deportation eligibility. The petitioners, however, applied for a suspension of deportation under section 241(a)(1) of the Immigration and Nationality Act. *See* 8 U.S.C. § 1254(a)(1). The immigration judge denied their application, and the Board of Immigration Appeals dismissed their ensuing appeal.

The petitioners now appeal to this court the decision of the Board of Immigration Appeals.

STANDARD OF REVIEW

An appellate court reviews the Board of Immigration Appeals' findings regarding extreme hardship for abuse of discretion. *Hernandez-Cordero v. INS*, 819 F.2d 558, 560 (5th Cir. 1987).

DISCUSSION

Under section 241(a)(1) of the Act, an applicant for suspension must establish the following: (1) his physical presence in the United States for a continuous period of at least seven years prior to his application date; (2) good moral character; and (3) that his deportation would result in extreme hardship. The petitioners have readily established their continuous physical presence and good moral character. The only issue in dispute is whether their deportation would result in extreme hardship.

The Board of Immigration Appeals determined that the petitioners failed to establish extreme hardship. The petitioners contend that the Board failed to properly consider the extent of religious discrimination they would experience in Malaysia and the effect it would have on their children who are United States citizens. Specifically, they contend that because they are not Moslems, they will not be able to procure adequate employment or educational opportunities for their children in Malaysia. They further contend that the Board failed to consider their financial status and service to the community.

In *INS v. Wang*, the Supreme Court upheld a narrow interpretation of the "extreme hardship" requirement in applications for suspension of deportation. 450 U.S. 139

(1981); *also see Hernandez,* 819 F.2d at 563 ("the BIA abuse[s] its discretion only . . . where the hardship is uniquely extreme, at or closely approaching the outer limits of the most severe hardship . . . and so severe that any reasonable person would necessarily conclude that the hardship is extreme"). In *Hernandez,* the Fifth Circuit emphasized that an appellate court's review should primarily concentrate on whether the Board of Immigration Appeals has considered, both individually and collectively, all the factors presented to establish extreme hardship. *Hernandez,* 819 F.2d at 563.

Upon a careful review of the record, it is apparent that the Board of Immigration Appeals considered the petitioners' financial status and contributions to the community and found them insufficient to establish extreme hardship. The Board also noted and considered their contention that they would experience discrimination in Malaysia because they are not Moslems. Nevertheless, the Board concluded "that all of the factors presented, considered in their entirety, do not constitute extreme hardship within the meaning of the Act." Under the Supreme Court's narrow standard of review permitted in *INS v. Wang,* we cannot conclude that the Board abused its discretion in reaching its ruling.

Thus, we affirm the Board of Immigration Appeals.

AFFIRMED

U.S. Department of Justice
Executive Office for
Immigration Review
Falls Church, Virginia 22041

Decision of the Board
of Immigration Appeals

Files: A29 597 221 - Orlando
A29 597 222

Date: NOV 16 1993

In re: SUAN SEE CHONG
CHIU HI TAN

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF
RESPONDENTS: Lawrence B. Fabacher, II, Esquire
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833 Baronne Street
New Orleans, Louisiana 70113

ON BEHALF OF SERVICE: Javier Balasquide
General Attorney

CHARGE:

Order: Sec. 241(a)(1)(C)(i), I&N Act [8 U.S.C. § 1251(a)(1)(C)(i)] – Nonimmigrant – failed to comply with conditions of status (A29 597 221)

Sec. 241(a)(1)(B), I&N Act [8 U.S.C. § 1251(a)(1)(B)] – Nonimmigrant – remained longer than permitted (A29 597 222)

APPLICATION: Suspension of deportation

In a decision dated December 8, 1992, an immigration judge found the respondents deportable based on their own admissions, denied their applications for suspension

of deportation, and granted them the privilege of voluntary departure with an alternative order of deportation to Malaysia if they should fail to depart. The respondents appealed. The appeal will be dismissed.

The respondents are a 30-year-old male and a 28-year-old female who are husband and wife. Both respondents are natives and citizens of Malaysia. The male respondent first came to the United States as a student in August 1982. He returned to Malaysia in April 1985. He was admitted to the United States on July 9, 1985, as a nonimmigrant student and was authorized to remain for the duration of that status. The male respondent last attended a school authorized by the Immigration and Naturalization Service in July 1989. On April 11, 1990, the male respondent's status was adjusted to that of a trainee, and he was authorized to remain until April 21, 1993. He has not been employed as a trainee since July 1991. An Order to Show Cause was issued against him on March 24, 1992, charging him with remaining longer than permitted, under section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B). The female respondent was admitted to the United States as a nonimmigrant student on January 7, 1983, and was authorized to remain for the duration of that status. In August 1988 her status was adjusted to that of a wife of a nonimmigrant student. Her husband did not attend a school authorized by the Service since July 1989, and she has remained in the United States beyond that time. An Order to Show Cause was issued against her on March 24, 1992, charging her with failing to comply with the conditions of her nonimmigrant status, under section 241(a)(1)(C)(i) of the Act, 8 U.S.C. § 1251(a)(1)(C)(i). The

respondents admitted the allegations in the Order to Show Cause and conceded deportability. We find that deportability has been established by clear, unequivocal, and convincing evidence. *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(a). The only issue on appeal concerns the respondents' applications for suspension of deportation.

Under section 244(a)(1) of the Act, 8 U.S.C. § 1254(a)(1), an applicant for suspension of deportation must establish that he or she has been physically present in the United States for a continuous period of at least 7 years preceding the date of the application, that he or she has been a person of good moral character for all that time, and that his or her deportation would result in extreme hardship to himself or herself, or to his or her spouse, parent, or child who is a citizen or lawful permanent resident of the United States. In the present case, there is no issue regarding either the respondents' continuous physical presence in the United States or their good moral character. The issue is whether they have met the extreme hardship requirement.

In his decision, the immigration judge concluded that the respondents had not shown that either they or their two United States citizens children, ages 2 and 6, would suffer extreme hardship if the respondents were to be deported. The immigration judge found that any economic hardship or diminished educational opportunities, as well as adjustment to life in Malaysia, did not amount to extreme hardship within the meaning of the Act. On appeal, the respondents urge that they and their children would face extreme hardship if forced to return to Malaysia. It is contended that the immigration judge did not

fully consider the discrimination that the respondents and their children would face in Malaysia because they are not Moslems. It is also contended that the immigration judge did not fully consider the respondents' financial status and their assistance to the community.

The Board has held that "extreme hardship" is not a definable term of fixed and inflexible content or meaning. The elements required to establish "extreme hardship" are dependent upon the facts and circumstances peculiar to each case. *Matter of Kim,* 15 I&N Dec. 88 (BIA 1974); *Matter of Hwang,* 10 I&N Dec. 448 (BIA 1964). Factors relevant to the issue of "extreme hardship" include: age; health; education; occupation; financial circumstances; likelihood of obtaining employment in the country of deportation; adjustment to new environment; family ties here and abroad; length of residence in the United States; and conditions, both economic and political, in the country to which the alien is being returned. *See Hernandez-Cordero v. INS,* 783 F.2d 1266 (5th Cir. 1986); *Mejia-Carrillo v. INS,* 656 F.2d 520 (9th Cir. 1981); *Matter of Anderson,* 16 I&N Dec. 596 (BIA 1976); *Matter of Kim, supra; Matter of Sangster,* 11 I&N Dec. 309 (BIA 1965); *Matter of Hwang, supra.* The fact that an alien's economic opportunities or standard of living may be less in the country to which he is deported than in the United States does not by itself establish "extreme hardship." *Matter of Anderson, supra; Matter of Kim, supra.*

We have carefully reviewed the record in this case, and have concluded that all of the factors presented, considered in their entirety, do not constitute extreme hardship within the meaning of the Act. The record indicates that the respondents started a computer consulting

firm in June 1991, which firm has two United States citizen employees and gross annual revenues of in excess of $500,000. The male respondent has previous employment history as an architect and the female respondent has training as an accountant. We note the contention that, as ethnic Chinese, the respondents' employment opportunities are limited in Malaysia. However, evidence of record, in the form of United States Department of State documents, indicates that Malaysians of Chinese decent make up approximately one third of the population of Malaysia and reportedly play important roles in trade, business, and finance. While the employment opportunities for the respondents may not be as promising in Malaysia as they are here, we do not find, given their educational and employment background, that extreme hardship is shown. There is no suggestion that they will be unable to provide for their family's financial needs in Malaysia. The assets that they have accumulated in this country, including the computer consulting company, can serve as a source of funds which will considerably ease their adjustment to living in the Malaysia. Additionally, both respondents have extensive family ties in Malaysia. The male respondent's parents own a 100-acre farm there and 10 of the respondent's 11 siblings live in Malaysia, while the female respondent's mother and 6 siblings all reside in Malaysia. We also note the concerns expressed that the educational opportunities available in Malaysia for the two United States citizen children will not be of the standard available in this country. However, the respondents managed to obtain adequate, at the least, educations in Malaysia through the high school level before coming to the United States for their college

studies, and there is no showing that their children could reasonably expect to obtain anything less. We also note the relatively young ages of the two children, ages 2 and 6. Thus, the move to Malaysia would not be significantly disruptive of their educational programs. *See Matter of Kim, supra.* The respondents are relatively young, apparently healthy, and well able to work, and the children should have little difficulty adjusting to life with their family in Malaysia. The male respondent has a brother in the United States, indicating the potential, at least, for eventually other means of adjusting their status.

The Supreme Court has noted the "exceptional nature of the suspension remedy" and has upheld a narrow interpretation of the extreme hardship requirement as consistent with the statutory language. *INS v. Wang,* 450 U.S. 139 (1981). *See also Barrera-Leyya v. INS,* 653 F.2d 379 (9th Cir. 1981). Deportation involves some hardship to almost every alien. We do not think, however, that the hardship described by the respondents is the kind of hardship contemplated by Congress. We are not unmindful of the respondents' service to the community in which they reside, including participation the Gulf Coast Chinese Association and the parent teacher association at the older child's school. However, we do not find the existence of such considerations warrants granting the exceptional relief of suspension of deportation in this case. As we find that the statutory criterion of extreme hardship is not satisfied, we do not consider whether suspension of deportation is warranted as a matter of discretion.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order and in accordance with our decision in *Matter of Chouliaris*, 16 I&N Dec. 168 (BIA 1977), the respondents are permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the district director; and in the event of failure so to depart, the respondents shall be deported as provided in the immigration judge's order.

/s/ James P. Morris
FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
Orlando, Florida

File No.: A 29 597 221
29 597 222

December 8, 1992

In the Matters of SCWAN SI CHONG TAN CHUI HI TAN Respondents	)	IN DEPORTATION PROCEEDINGS

CHARGE: Section 241(a)(1)(C)(i) – Failed to comply with conditions of nonimmigrant status (adult female respondent); Charge: 241(a)(1)(B) – nonimmigrant remained in the United States longer than permitted (adult male respondent)

APPLICATIONS: Suspension of deportation; in the alternative voluntary departure

ON BEHALF OF RESPONDENTS:

Lawrence Fabacher II, Esquire
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ON BEHALF OF SERVICE:

William Gossard, Esquire
Trial Attorney/INS

ORAL DECISION OF THE IMMIGRATION JUDGE

The respondents are a husband and wife, both of whom are natives and citizens of Malaysia, who were

issued Orders to Show Cause on or about March 24th, 1992, *See* Exhibits 1-A and 1-B. At a Master Calendar hearing on August 20, 1992, respondents submitted a written stipulation admitting the allegations in the respective charging documents, and conceded deportability. Deportability has been established by clear, unequivocal, and convincing evidence, as required by the Supreme Court in *Woodby v. INS*, 385 U.S. 276 (1966); 8 C.F.R. 242.14(a). The issue before the Court concerns their applications for relief today.

FINDINGS OF FACT

Both respondents testified regarding their arrivals in the United States in 1982 and 1983 respectively. The male respondent left briefly for Malaysia, for 2 months, with the intention of returning to the United States to continue his studies. The wife came in 1983 and never departed from this country. The minimal break of 2 months, in 1985 by the male respondent, did not break the continuity of his physical presence, and both respondents have established the 7 years required for this relief.

With regards to good moral character, as referenced earlier at the beginning of the hearing, sheriff's and police records reflect no felony or misdemeanor convictions, and the respondents have been credible and truthful in their testimony today and I'm satisfied that they've each met the good moral character requirement.

With regards to extreme hardship, the lead respondent testified that he has 2 United States citizen children, approximately ages 6 and 2, the oldest is in the first grade. He began employment with the Kentucky Fried

Chicken chain, as a cook, in 1982. From 1983 to 1991, he worked for Domino's Pizza; and at one point he was working towards his architectural degree by day and then working as an architect and then also working for Domino's at night. He started his own business, finally, in June of 1991; a computer consulting firm. He presently employs 2 United States citizens, and his business now brings in more than $1,000,000. He pays sales tax in excess of $30,000 a year, and has invested over $30,000 in this new business venture.

The lead respondent's wife has finished a two-year accounting school and is a housewife, taking care of the young children. Both parents are active with their children in the Parent Teachers Association, attending meetings every six weeks. Both are also active in the Gulf Coast Chinese Association, in which they teach youth Chinese culture and language. This group meets approximately once a week.

With regards to family ties in the United States, the adult male respondent has a brother who appears to be a permanent resident in Texas. The remaining family members live in Malaysia. For the adult female respondent, this consists of several siblings; for the male respondent, 10 siblings, 5 brothers and 5 sisters. He also has both of his parents. His father is a farmer on 100 acres of farm property.

Respondent feels that if he returned to Malaysia, he and his children would be discriminated against because professional job opportunities would be very slim. The best he feels he could be able to do is be a truck driver. He has stated that he feels that the majority of his home

country is Moslem and that he would have to pay an exorbitant fee in order to get started in a business, even if he were able to get permission to do so. He feels that the impact on his children would deprive them of the educational opportunities that they will soon both enjoy here in the United States. He feels that although they might be able to finish high school in that country, that they would not have any opportunity to go to college because they are not Moslem.

On cross-examination, by the trial attorney, the male respondent did indicate that he attended primary school in Malaysia and finished high school. He was able to come to the United States at the age of 19 and to go to college. His wife also finished a high school education in that country, and respondent stated that there is free medical care available to his family. Finally, in the alternative, the parties qualify themselves for voluntary departure.

STATEMENT OF THE LAW

Section 244(a)(1) of the Immigration and Nationality Act provides that the Immigration Judge, in his discretion, may suspend deportation of an applicant who's been physically present for seven years immediately proceeding such application, if they can also establish good moral character and if the alien's deportation would result in extreme hardship to himself, or herself, or their United States citizen or lawful permanent resident spouse, parent, or child.

The term "extreme hardship" is a term that's dependent upon the facts and circumstances of each particular

case, *Matter of Kim*, 15 I&N Dec. 88 (BIA 1974); *Matter of Sangster*, 11 I&N Dec. 309 (BIA 1965). Economic hardship by itself is insufficient to establish extreme hardship within the meaning of the Act, *See Diaz-Salazar v. INS*, 700 F.2d 1156 (7th Cir.) *cert. denied* 103 *S. Ct.* 3112 (1983).

Moreover, the mere claim that educational opportunities for one's United States citizen children are better in the United States than in one's home country, does not alone require a finding of extreme hardship, *Hollay v. INS* 727 F.2d 189 (1st Cir. 1984); *Matter of Kim, supra.* It is well settled, however, that hardship is more severe to school-aged children who must adjust to a new environment, than it is to preschool-aged children, *See Prapavat v. INS*, 638 F.2d 87 (9th Cir. 1980). Ultimately, the burden rests with the respondent to establish both statutory eligibility and that they merit this relief as a matter of discretion.

In *Matter of Anderson*, 16 I&N Dec. 596 (BIA 1978), the Board enunciated numerous factors of relevance in determining the extreme hardship issue. They include but are not limited to: age of the respondents, health, wealth, education, occupation, ties in this country and abroad, length of residence in the United States, and conditions in the country to which they would return, both economic and political.

FINDINGS BY THE COURT

In this case, I find that the respondents have clearly established the 7 years required, as well as good moral character throughout this time period. The issue to be

resolved is whether they have established extreme hardship. A narrow interpretation of extreme hardship is consistent with the exceptional nature of the suspension remedy. Unique or severe hardship is necessary to demonstrate extreme hardship, *See Hernandez-Cordero v. INS*, 819 F.2d 558 (5th Cir. 1987); *See* also, *Ramirez-Durazo v. INS*, 794 F.2d 491 (9th Cir. 1986).

Some background on Malaysia from the *Rand McNally World Facts*, Concise International Review of the 1993 edition, reflects that today Malaysia is 53 percent Moslem, 17 percent Buddhist, and 12 percent Chinese, in terms of their religion. In terms of the people of that country, it is approximately 30 percent Chinese descendants. The mostly rural Malays dominate politically, while the predominate urban Chinese are very active in economic life. There are considerable tensions that exist between the two groups.

In this case, the respondent has stated that if he were to return to his home country, he feels that he would be discriminated against by the Moslems and would not be able to continue in the computer consulting business that he has successfully begun in this country, and that the best employment opportunity that he might be able to obtain would be as a truck driver. The respondent has not supported his position with any documentary evidence of record, and his allegations are insufficient to establish inability to find suitable employment if required to depart from the United States. *Ramirez-Gonzalez v. INS*, 695 F.2d 1211 (9th Cir. 1983). Further, difficulty finding similar employment in one's native country is not extreme hardship, *Batoon v. INS*, 707 F.2d 391 at page 401 (9th Cir. 1983).

Respondent has stated that both he and his wife have extensive family members who are living in Malaysia today. His father has a 100-acre farm. He indicated that they would not be able to provide finances if they returned to that country, but could, perhaps, provide them a place to live. Certainly, his return to Malaysia, where he has 10 siblings and both parents and his wife has her mother and several siblings, would ease their adjustment emotionally. Further I am not satisfied that the children would suffer disproportionately from their educational opportunities that the one child is presently enjoying in the United States. Even though United States citizen children may face some difficulties in adjusting to life in their parents' homeland, these difficulties do not materially differ from those encountered by other children, especially at a young age, *See Marquez-Medina v. INS*, 765 F.2d 673 (7th Cir. 1985). The fact that economic and educational opportunities for the respondents' U.S. citizen children are better in this country than in their homeland, does not establish extreme hardship, *Matter of Kim, supra.*

The respondents I have found to be fully credible in their testimony today, and are a lovely family. Certainly, after spending a period of time of approximately 10 years in the United States, successfully completing college and a two-year program, and starting a successful business in 1991, there will be some hardship suffered by this family, having to uproot after such a lengthy period of time and return to their home country. I do not find, considering the testimony and documentary evidence of record, in the totality both collectively and individually, that the factors in this case would amount to extreme hardship within the

meaning of the statute. Accordingly, I do not find that the respondents have met the extreme hardship test and, thus, not established statutory eligibility for this relief.

In the alternative, the respondents have requested voluntary departure. I am satisfied that they are ready, willing, and able, to depart the United States at their own expense and are worthy of a favorable exercise of the Court's discretion for this minimal form of relief, *See Matter of Turcotta*, 12 I&N Dec. 206 (BIA 1965).

Accordingly, the following orders are hereby entered.

ORDER

IT IS ORDERED THAT the respondents are found deportable based on their separate written stipulations to the charge in the respective Orders to Show Cause.

FURTHER ORDER

IT IS FURTHER ORDERED THAT both respondents' applications for suspension of deportation are hereby denied.

IT IS FURTHER ORDERED THAT the respondents are permitted to depart from the United States voluntarily on or before February 8, 1993, or any extension beyond that date that may be granted by the District Director of the Immigration and Naturalization Service; and in the event of their failure to so depart, the respondents shall be deported to their native country of Malaysia.

/s/ J. Daniel Dowell
J. DANIEL DOWELL
Immigration Judge

RECEIVED 2/10/95